IN THE

Supreme Court of the United States

October Term, 1951

No. 431

ZORACH, et al., *Appellants*,

vs.

CLAUSON, et al., *Appellees*.

BRIEF OF THE STATE OF WEST VIRGINIA AMICUS CURIAE

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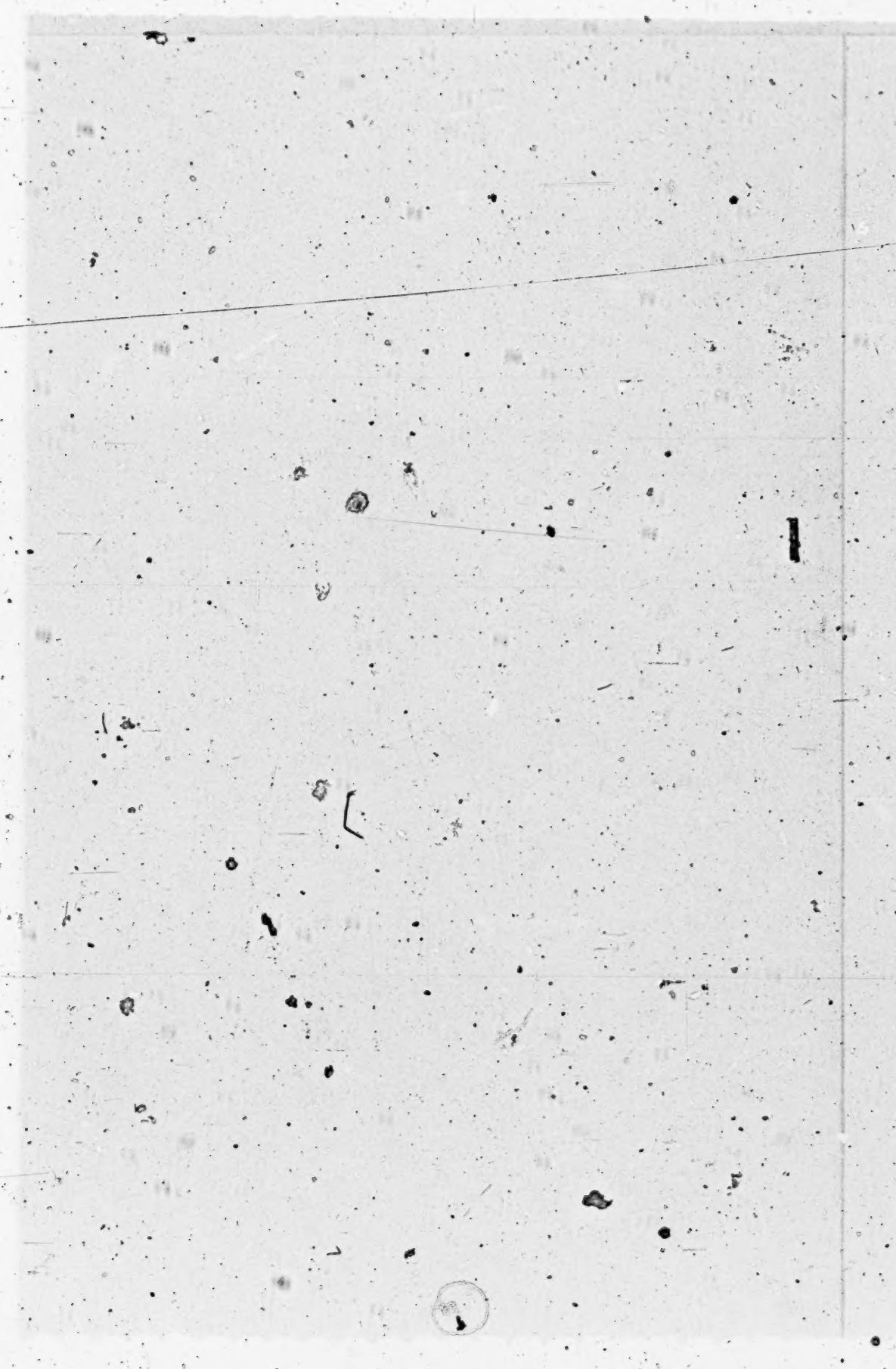

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I.

STATEMENT OF POSITION

1. Purpose and Scope

The State of West Virginia, by its Attorney General and pursuant to Rule 27-9(d) of the Court, files this brief in opposition to the appeal of appellants to review the judgment of the Court of Appeals of New York, entered in the above entitled case on July 1, 1951, and reported in 100 N. E. 2d 463.

The purpose of this brief is to urge this Court to affirm the judgment of the Supreme Court of Appeals of New York.

The scope of this brief is to be confined to the following basic constitutional question: Do the First and Fourteenth Amendments prohibit the "released time" program of religious instruction in New York City?

2. Interest of this Amicus Curiae.

This basic constitutional question is of vital importance to the State of West Virginia. A decision by this Court reversing the New York Court on this question would raise a serious doubt as to the constitutionality of the "released time" program in the State of West Virginia, as authorized by Chapter 18, Article 8, Section 1 of the Code of West Virginia, which provides, in part, as follows:

> "Compulsory school attendance shall begin with the seventh birthday and continue to the sixteenth birthday. Every person who has legal or actual control of a child or children not less than seven nor more than sixteen years of age shall cause such child or children to attend a free day school for the full school term of the county where such person resides.
>
> "Exemption from the foregoing requirement of compulsory public school attendance shall be made on behalf of any child for the following causes or conditions, each such cause or condition being subject to confirmation by the attendance authority of the county:

"* * *

"Exemption J. Church Ordinances; Observance of Regular Church Ordinances.—The county board of education may approve exemption for religious instruction upon written request of the person having legal or actual charge of a child or children: Provided, however, that such exemption shall be subject to the rules and regulations prescribed by the county superintendent and approved by the county board of education."

This statute was enacted by the elected representatives of the people of this State in order that the strong religious traditions of the people of West Virginia might thereby be preserved and in order that the requirement of compulsory school attendance should not interfere with the right of parents to exercise freedom of conscience with respect to the religious instruction of their children.

II

ARGUMENT

1. The "Released Time" Program of Religious Instruction in New York City does not violate the First and Fourteenth Amendments to the Constitution.

The program under consideration represents the absolute minimum of cooperation between school and religious authorities with respect to "released time." It goes no further than to permit children to be excused from school for one hour a week for religious instruction. Other than the recognition of this as a valid

reason for absence from school, there is no participation in the plan by anyone connected with the school system. In the *McCollum* case, in the concurring and dissenting opinions, a majority of this Court specifically recognized that "released time" as such is not unconstitutional. The opinion of the Court, delivered by Justice Black, confines the decision to facts radically different from those now before the Court.

Should this Court agree with appellants' contention as to the proper interpretation of that part of the First Amendment which forbids laws "respecting an establishment of religion," it is believed that it would necessarily endanger that part which also forbids laws "prohibiting the free exercise thereof." The natural right of parents to guide the education of their children has been guaranteed to them under the Constitution as interpreted by this Court. *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. With this in mind the constitutional right of parents to take advantage of a provision of state law allowing them to provide their children with religious instruction during a small portion of the time they are required to attend public schools should be beyond question. It might be suggested that such instruction could just as well be given some time other than during the school week. However, the parents' preference as to time should be controlling so long as the rights of others and the Constitution are not violated.

Special attention should be given to the historical background and meaning of the phrase "Congress shall make no law respecting the establishment of reli-

gion, * * *." We urge that an examination of the historical background of this phrase, as well as the traditional interpretation of it, especially in the early years of the nation, will foreclose any supposition that the scant recognition which the practice in New York gives to religion is in violation of the Constitution.

The nationwide practice of excusing pupils from school on holy days set apart by the various religions cannot be distinguished, to the advantage of appellants, from the program under consideration. Certainly, if a child may be excused to attend a religious ceremony he may be excused for the purpose of receiving instruction in the faith authorizing that ceremony.

This is merely a temporary suspension of the requirement of school attendance in order not to deprive children of their right to be instructed in religion at the time and in the manner elected by their parents. Complete authority is vested in the State Commissioner of Education to establish the rules under which absence from school shall be permitted. Therefore, the integrity of the school program is preserved intact. However, a way is provided so that the religious program need not be obstructed, and thus church and state placed in opposite warring camps.

Cooperation between governmental and religious institutions in many instances is so well known that it has become a part of the American way of life. Chaplaincies in the armed forces and Congress, the National School Lunch Act and compulsory church attendance at the service academies are examples. This Court has approved similar practices in *Everson*

v. *Board of Education*, 330 U. S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (use of public funds for transportation of children to parochial schools), and in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370, 74 L. Ed. 913, 50 S. Ct. 335 (free textbooks for children in private schools). The incidental benefit to religion in the above cases is comparable to that received by religion in this case.

2. This Case does not fall within the Rule established by This Court in the Case of People of the State of Illinois ex rel. Vashti McCollum v. Board of Education.

People of the State of Illinois ex rel. Vashti McCollum v. *Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 648, is not a precedent in the instant case. In the *McCollum* case the appellant brought her action on the basis of being a taxpayer and, as such, injured by the use of tax-supported property for religious education. We do not see how appellants in this case can claim any such injury. Here, as opposed to the *McCollum* case, tax-supported school property was not used in any degree in giving religious instructions. The teachers giving the religious instructions were neither selected, supervised or approved by school authorities. Neither were pupils solicited in the school, nor by school authorities.

The most that can be said of appellees in this case is that they permitted children to leave the school at the request of their parents and maintained a record as to their whereabouts.

The regulations of the appellees do not, as the Court stated in the *McCollum* case, "authorize the comming-

ling of sectarian with secular instruction in the public schools," which the court stated the Constitution of the United States forbids. In the opinion of the Court in the *McCollum* case, Justice Black recognized, by implication, that the opinion was based upon the facts of that case and was not such as to declare all the "released time" programs unconstitutional. Mr. Justice Frankfurter in his concurring opinion specifically stated that "released time" as such is not unconstitutional. He recognized that facts substantially differing from those in the *McCollum* case might serve as a basis for an opinion contrary to that which he wrote.

If "released time" as such is not unconstitutional, the instant case presents facts that must lead inevitably to the conclusion that this "released time" program is constitutional. The instant case is one of minimum cooperation between the school officials and the persons furnishing the religious instruction, and the absolute lack of the use of tax-supported facilities to further religious instruction. Unless this Court is prepared to say that a parent may not request that his child be released from school for a period of time for a religious undertaking under any circumstances, we believe that this Court must affirm the position of the Court from which this case was appealed.

III

CONCLUSION

It is submitted that it has been demonstrated that the questions presented by this case are of vital importance to the State of West Virginia. The First and Fourteenth Amendments to the Constitution were manifestly not intended to operate so that a sovereign state would be prevented from providing by law for the minimal cooperation between church and state which is entailed by the "released time" program under consideration. We request that the judgment of the Court of Appeals of New York be affirmed and the appeal dismissed.

Respectfully submitted,

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